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October 21, 1997

Re: Reply Comments of the Small Cable Business Association:
Implementation of Section 703(e) of the Telecommunications Act of 1996
CS Docket No. 97-151

If you have any questions, please call.

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Mr. William Caton
October 21, 1997
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Enclosures

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The Honorable James Quello, Commissioner
The Honorable Susan Nease, Commissioner
The Honorable Rachelle Chong, Commissioner
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FEDERAL COMMUNICATIONS COMMISSION
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HOWARD & HOWARD
ATTORNEYS

**Before the
Federal Communications Commission
Washington, D.C. 20554**

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**FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY**

In re Matter of

**Implementation of Section 703(e)
of the Telecommunications Act
of 1996**

**Amendment of the Commission's Rules
and Policies Governing Pole Attachments**

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CS Docket No. 97-151

**REPLY COMMENTS OF THE
SMALL CABLE BUSINESS ASSOCIATION**

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October 21, 1997

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**REPLY COMMENTS OF THE
SMALL CABLE BUSINESS ASSOCIATION**

I. INTRODUCTION

The Small Cable Business Association ("SCBA") provides these comments to highlight the impact of excessive pole attachment rates on small cable and to reply to comments earlier raised in this proceeding.

SCBA is the only cable trade organization dedicated to the concerns of small, independent cable operators. SCBA members operate small cable systems and small cable companies across the United States. The majority of SCBA's members have fewer than 1,000 total subscribers. SCBA regularly participates in Commission proceedings to articulate the concerns of small cable operators and to help protect the economic interests of SCBA members.

In other proceedings, SCBA has alerted the Commission to the disparate cost burdens of small cable. The Commission has responded by relieving small cable of many regulatory burdens and adopting special protections to ensure the viability of small cable systems. Pole

attachment rates, however, remain an area in which small cable pays far more than large cable operators. Small cable's other chief competitors, DBS operators, pay no pole attachment fees at all. Consequently, small cable operators and their subscribers have become especially vulnerable to excessive pole attachment rates. SCBA comments upon the need for reasonable pole attachment rate regulations.

II. BURDENSOME POLE ATTACHMENT COSTS PLACE DISPARATE BURDENS ON SMALL CABLE AND PRESENT A BARRIER TO ENTRY

Pole attachment rates, terms and conditions impose unique burdens on small cable. This results primarily from the low-density rural areas typically served by small cable. As explained in greater detail below, these lower subscriber densities result in a higher ratio of poles to subscribers, magnifying the impact of pole attachment costs in small systems.

The rural areas typically served by small cable have low subscriber densities. Often, these areas have densities of 10-15 homes per mile. By contrast, franchise authorities typically do not even require larger system operators to build in areas with fewer than 15 - 20 or higher homes per mile. The subscriber density difference creates much higher pole costs for small cable, even though urban areas typically have more poles per mile. For example, a rural system typically has 300 foot spans between poles, compared to a more urban system that might have 200 feet between poles. This means that a rural system will have about 18 poles per mile, while a suburban system will have 26 poles per mile.

Even with this differential, the per subscriber pole attachment cost of rural cable operators far exceeds that of urban-based operators.¹ By developing per subscriber cost comparisons, one can assess the true pole attachment cost disparity between large and small cable operators. The following table shows the cost of pole attachments on a per subscriber basis where the identical cost per pole exists between a small and larger system.

Type of System	Poles per Mile	Cost per Pole	Total Cost per Mile	Subscribers per Mile ²	Cost per Subscriber
Rural	18	\$4.00	\$72.00	7	\$10.29
Suburban	26	4.00	104.00	36	2.89
Urban w/MDUs	26	4.00	104.00	210	0.50

This example shows the dramatic impact that pole attachment costs have on small cable. Small cable's cost per subscriber is 256% higher than a more urban system and almost 2,000% higher than urban systems with MDUs. When one factors into the computation the reality of higher pole attachment rates frequently encountered by small systems, particularly the unregulated pole rates charged by rural cooperatives and municipal utilities, the disparity between the cost per subscriber grows geometrically. For example, some small operators pay \$13.40 or more per pole. This increases the total cost per subscriber to \$34.46 or almost 1,100% higher than a typical suburban system.

¹ The appropriate unit of measure for the costs of small cable remains the cost per subscriber.

² Assumes 70% penetration of 10 homes per mile for the small system and 70% of 52 homes per mile for the large system and 300 homes per mile for the system with MDUs.

Small cable faces significant challenges. Small cable operators pay pole attachment rates far in excess of large operators. Even so, SCBA members have also encountered significant additional cost increases in recent years.³ Moreover, SCBA members often find themselves on the poles of rural telecommunications or power providers who distribute direct broadcast satellite ("DBS") services, giving them an incentive to engage in predatory pricing of attachments.

These pole attachment issues and the impact of unregulated and rapidly escalating prices create barriers to wire-line entry into new services. Congress mandated that the Commission enact the regulations necessary to remove these barriers for "entrepreneurs and other small businesses."⁴ To satisfy this directive, the Commission should reenforce existing pole attachment rate regulations and urge Congress to eliminate the municipal and rural cooperative exemptions.

III. SMALL CABLE'S EXPERIENCE WITH UNREGULATED ATTACHMENTS DRAMATICALLY ILLUSTRATES THE FAILURE OF MARKETPLACE NEGOTIATIONS

Commentors representing pole owner utilities predictably ask the Commission to leave pole attachment rates to marketplace negotiations.⁵

³*Comments of Small Cable Business Association*, CC Docket No. 97-141 at 18 - 22.

⁴47 U.S.C. § 257(a).

⁵See, e.g., *Comments of Union Electric Company*, CS Docket No. 97-151 at 10 - 11 ("In sum, Union Electric believes that the Commission must place primary reliance on market based rates negotiated by the parties grounded on the economic costs and benefits to the parties."); *Comments of the New York State Investor Owned Electric Utilities*, CS Docket No. 97-151 at 5 ("Market rates freely negotiated between pole owners and party seeking to attach is the best way to effectuate the Telecommunication Act's goal of encouraging competition through reliance on market forces.").

The utilities' position ignores the economic and legal realities that eliminate even the remote possibility of balanced, "marketplace" pole attachment rate negotiations. The bottom line: marketplace negotiations cannot function where a monopolist controls access to a resource essential to its customer's viability. Two immutable factors create the de facto monopoly and hence the marked imbalance of bargaining power:

- **Economic Constraints.** Small cable principally serves rural, sparsely populated areas where low population densities make construction of a network of single user poles unaffordable.
- **Legal Constraints.** Even if small cable could economically and practicably construct its own pole network, franchise agreements typically dictate attachment to existing poles, precluding the construction of a duplicative pole network.

Congress did not intend for cable operators to create multiple, duplicative pole networks. To the contrary, Congress created a statutory regime requiring that cable, telecommunications and power providers share existing pole space under just and reasonable terms and conditions. In this way, the statute protects cable operators from the excessive attachment rates that could otherwise be extracted by pole owners.

The "marketplace" experience of cable operators and rural cooperatives is telling. Unconstrained by regulation, rural cooperatives have demonstrated that they will use their pole monopolies to extract excessive rates from small cable operators. To demonstrate the abuse, SCBA surveyed its members and found that, while cooperative rates vary dramatically, they far exceeded national averages.⁶ Even the similar survey of the National Rural Electric

⁶*Comments of the Small Cable Business Association*, CC Docket No. 97-141 at 18 - 21. In SCBA's survey, members reported pole rates ranging from a \$1.50 to \$13.40. On average, SCBA members reported rates of \$5.66 per pole, well in excess of the \$4.73 national pole attachment rate average.

Cooperative Association (NRECA) reflects the excessive pole attachment rates derived from "marketplace" negotiations. In its survey, NRECA reported that its members, on average, charge pole attachment rates of \$6.71 per pole, 42% higher than the national average of \$4.73 and 81% higher than the \$3.71 average for states computing pole attachment rates under the FCC methodology.⁷ It is no wonder that utilities want "marketplace" negotiations to control rates.

Small cable bears the brunt of much pole attachment rate abuse. Because of its more rural subscriber base, small cable pays far more per subscriber in pole attachment fees than do large urban-based cable operators. The Commission must eliminate this increasing barrier to entry under §257 by reenforcing pole attachment rules that constrain abusive practices of monopolist pole owners.

IV. POLE RATES SHOULD NOT INCLUDE THE COST OF EASEMENTS

Several commentators urge the Commission to allow electric utilities to incorporate the cost of right-of-way acquisition costs in pole attachment rates. This argument not only ignores the nature of the typical utility right-of-way but is also inconsistent with clear dictates of federal law that allow cable operators unfettered access to dedicated public utility easements.

⁷*NRECA Comments*, CC Docket No. 97-141 at 2. SCBA derives comparative averages from a 1995 pole attachment rate survey. Michigan Public Service Commission Case No. U-10831, Exhibit I-55. The survey identified a \$4.73 national pole attachment rate average and a \$3.71 average for states computing pole attachment rates under the FCC methodology.

A. The Life of the Utility Right-of-Way Almost Always Far Exceeds the Life of the Pole Attachment

The argument that utilities must recover right-of-way acquisition costs through pole attachment fees ignores the reality of the utilities' longstanding, often permanently dedicated easements. Commentors in this proceeding have correctly observed that utilities have typically recovered the direct costs of their rights-of-way long before a cable operator attaches its wire.⁸ Moreover, utilities typically charge "inspection" and other "make ready" costs to cable operators attaching to their poles, over and above pole attachment fees.⁹ Utilities are more than adequately compensated for costs associated with cable pole attachment.

As to other right-of-way "acquisition" costs, the Commission must recognize that a public utility right-of-way typically has an unlimited useful life. As one commentator observed, "rights-of-way do not wear out."¹⁰ Consequently, one cannot accurately assess to an individual cable operator its incremental share of right-of-way acquisition costs that relate to a perpetual easement. If allowed, the utility will recover its right-of-way acquisition costs many times over with the passage of time.

⁸*Comments of AT&T Corp.*, CS Docket No. 97-151 at Page iii.

⁹*Comments of Small Cable Business Association*, CC Docket No. 97-141 at Page 20 ("Pinetree will pay \$239,650 per year for utility expenses, or 22% of its total operating expenses. This amount does not include the additional \$1,500 to \$2,500 per mile make ready cost paid by Pinetree.")

¹⁰*Comments AT&T Corp.*, CS Docket No. 97-151 at 18.

B. The Cable Act Allows Cable Operators Unfettered Access to Public Utility Easements

47 USC §541(a)(2) authorizes cable system access to easements "dedicated for compatible uses." This provision ensures cable operator access to public utility easements, so that entrenched utilities and land owners cannot prevent subscriber access to cable. To ensure access, Congress clearly stated that "private arrangements which seek to restrict a cable system's use of such easements or rights-of-way which have been granted to other utilities are in violation of this section and not enforceable."¹¹ The law prohibits utilities from merely acting as a conduit for the imposition of these charges. Consequently, utilities cannot impose additional right-of-way acquisition costs upon cable -- costs ultimately borne by cable subscribers.

Attempts by private land owners to raise a "toll booth" for cable operator access to pole networks especially impacts upon small cable. Unlike urban-based cable operators operating in a dense network of public rights-of-ways, small cable often must traverse private easements to adequately serve its rural subscriber base. Ultimately, a rule allowing right-of-way access fees will again fall disparately upon small cable operators and their customers.

The Commission should reject the notion of right-of-way access acquisition cost recovery. It is an attempt by utilities to receive a windfall at the expense of cable subscribers. Such recovery would also violate the clear policy established by Congress in 47 USC §541.

¹¹ 98th Congress 2nd Session, House Report No. 90-934, Part III.

V. CONCLUSION

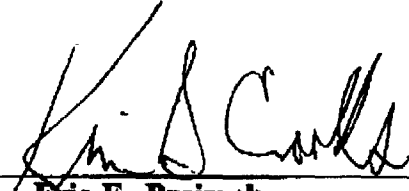
Small cable and small cable subscribers cannot continue to afford paying excessive pole attachment rates. Because of its more rural subscriber base, small cable must string more plant or more poles to reach fewer subscribers than large urban-based operators. As a result, small cable pays far more per subscriber in pole attachment fees than do large urban-based cable operators.

SCBA urges the Commission and Congress to fulfill their obligation under §257 and:
(i) maintain strict federal pole attachment rate regulations to ensure "just and reasonable" pole attachment rates; and (ii) repeal the municipal and rural cooperative exemptions from the rules.

Respectfully submitted,

SMALL CABLE BUSINESS ASSOCIATION

By: _____


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CERTIFICATE OF SERVICE

I, Carolyn Ann Priest, a secretary at the law firm of Howard & Howard, do hereby certify that a copy of the foregoing "Reply Comments of the Small Cable Business Association" was sent via first class mail, postage prepaid to the following persons, this 21st day of October, 1997.

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Chairman
Federal Communications Commission
1919 M Street, NW, Room 814
Washington, DC 20554

The Honorable Rachelle B. Chong
Commissioner
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The Honorable James H. Quello
Commissioner
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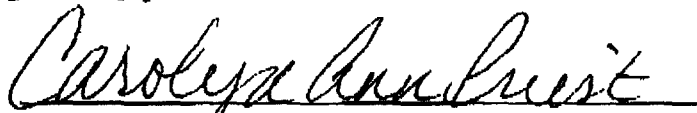
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and to Mr. Larry Wilke, Cable Services Bureau, 2033 M Street, NW, 4th Floor, Washington DC, 20554 along with a diskette containing the Reply.


Carolyn Ann Priest